

ESTTA Tracking number: **ESTTA432137**

Filing date: **09/23/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051279
Party	Plaintiff Red Hen Bread LLC
Correspondence Address	KATHRYN JENNISON SHULTZ JENNISON & SHULTZ PC 2001 JEFFERSON DAVIS HWY STE 1102 ARLINGTON, VA 22202 UNITED STATES kjs@jennisonlaw.com,kjs4jennisonlaw@aol.com
Submission	Plaintiff's Notice of Reliance
Filer's Name	Kathryn Jennison Shultz
Filer's e-mail	kjs@jennisonlaw.com,kjs4jennisonlaw@aol.com
Signature	/Kathryn Jennison Shultz/
Date	09/23/2011
Attachments	Notice of Reliance_20110923152735.pdf (19 pages)(478283 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RED HEN BREAD, LLC,

Petitioner,

v.

NORM OEDING

Registrant.

:
:
: Cancellation No. 92051279
: Reg. No. 3,614,763
: Mark: LITTLE RED HEN BAKERY
:
:
:

PETITIONER'S NOTICE OF RELIANCE PURSUANT TO RULE 2.120(j)

Petitioner, Red Hen Bread, LLC, by its attorneys, hereby submits this Notice of Reliance pursuant to Rule 2.120(j). Specifically, Petitioner relies on:

1. Registrant's Answers to Petitioner's First Set of Interrogatories Nos. 1, 3, 4(d), 6, and 12. Copies of which are attached hereto as Exhibit A.
2. June 23, 2009 Office action issued June 23, 2009, located in the USPTO's TDR prosecution history documents for Serial No. 77707868 (Petitioner's application to register RED HEN BREAD), by which the examining attorney refused registration based on the existence of Registration No. 3614763. Copy of this office action is attached hereto as Exhibit B.

Respectfully submitted,

RED HEN BREAD, LLC

Date:

Sept. 23, 2011

By:

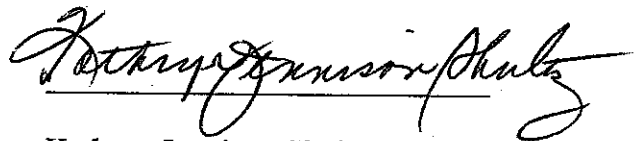
Kathryn Jennison Shultz

Kathryn Jennison Shultz
Jennison & Shultz, P.C.
2001 Jefferson Davis Highway – Suite 1102
Arlington, Virginia 22202

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S NOTICE OF RELIANCE was served upon Registrant Norm Oeding, by forwarding same via First Class Mail, postage prepaid, to Registrant's counsel, Robert O. Blinn, Erickson, Kernell, Derousseau & Kleypas, LLC, P.O. Box 75144, Wichita, Kansas 67275-0144, this 23rd day of September, 2011.

A handwritten signature in cursive script, reading "Kathryn Jennison Shultz", written over a horizontal line.

Kathryn Jennison Shultz

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

RED HEN BREAD, LLC

Petitioner,

v.

NORM OEDING

Registrant.

Cancellation No. 92051279

Registration No. 3,614,763

RECEIVED

NOV 03 2010

JENNISON & SHULTZ P.

**REGISTRANT'S ANSWER TO
PETITIONER'S FIRST SET OF INTERROGATORIES**

Registrant, Norm Oeding, hereby answers Petitioner's First Set of Interrogatories as follows:

INTERROGATORIES

1. Identify each person whom you know or believe to have knowledge of any fact or matter relevant to the subject matter of this proceeding and briefly describe the nature or subject matter of that person's knowledge.

Answer: Norm Oeding has knowledge of all aspects of the production and marketing of Little Red Hen Bakery products.

3. Identify each natural person currently or previously employed by Registrant who possesses knowledge, information or is primarily responsible for the marketing, actual sales of products bearing the mark LITTLE RED HEN BAKERY and potential sale of products bearing the mark LITTLE RED HEN BAKERY including, but not limited to, the persons responsible for the sale of each separate line or category of products sold under or using the mark LITTLE RED HEN BAKERY in the United States for each year from the first date of sale or distribution until the present.

Answer: None.

4. Identify by common commercial descriptive name each product and service actually and/or intended to be offered for sale, advertised and/or promoted by or on behalf of Registrant or any predecessor person(s) or company(ies) bearing the LITTLE RED HEN BAKERY mark, and for each product and service:

d) state the geographic areas (by town, city, county and state) in which the products have been sold or distributed;

ANSWER:

As the Petitioner may recall, Registrant produced documents OEDING00017-OEDING00036, gives quarterly sales records for indicated products.

The information needed to interpret documents OEDING00017-OEDING00036 was given on pages 5 and 6 of Registrant's Second Supplemental Answer to Petitioner's First Set of Interrogatories Registrant's Supplemental Responses to Respondent's First Set of Requests for

Production of Documents to Petitioner dated December 15, 2010. It occurs to the Registrant that Registrant did not provide the County of each of the retail locations given on page 5 and 6 of Registrant's Second Supplemental Answer to Petitioner's First Set of Interrogatories. Accordingly, Registrant now provides that information which is readily available to any having access to a multitude of on-line maps such as Google-Earth:

Kansas Grown Farmer's Market – Wichita, KS, Sedgwick County

White's Foodliner, Kingman, KS, Kingman County

White's Foodliner, ~~Cheney~~ Goddard, KS, Sedgwick County

Jim's Foodliner, Cheney, KS, Sedgwick County

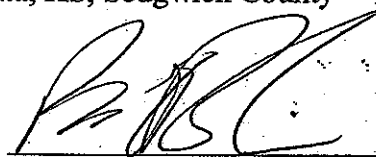
Food for Thought Natural Foods Market, Wichita, KS, Sedgwick County

Whole Foods Association of Wichita, Wichita, KS, Sedgwick County

Whole Foods Association of Wichita, Wichita, KS, Sedgwick County

Whole Foods Association of Wichita, Wichita, KS, Sedgwick County

By:



Robert O. Blinn,
Of Counsel
ERICKSON, KERNELL, DERUSSEAU
& KLEYPAS, LLC
P.O. Box 75144
Wichita, KS 67275-0144
E-mail: rblinn@robertblinn.com

Attorney for Registrant
Norm Oeding

6. Identify any third party employed or consulted in connection with promoting, advertising, marketing, launching, or announcing the goods sold under or in connection with Registrant's mark.

Answer: There are no such third parties.

12. Identify each distributor outside of Kansas for each product bearing Registrant's Mark since the date of first sale or distribution.

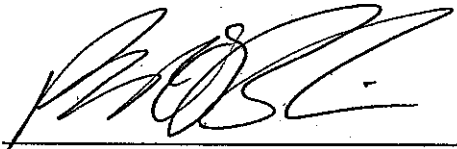
ANSWER:

Mr. Oeding has no distributors outside of Kansas.

As to any objections or arguments given above:

Respectfully submitted,

Date: 11/22/2010


Robert O. Blinn

CERTIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF SEDGWICK)

Norm Oeding, being first duly sworn deposes and says:

I am the Registrant herein.

I have read the foregoing, and the answers thereto are true to the best of my knowledge, information and belief.

Norm Oeding
Norm Oeding

Subscribed and sworn to before me this 1st day of November, 2010.

Michelle Green
Notary Public

SEAL



My commission expires:

Oct. 08, 2013

CERTIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF SEDGWICK)

Norm Oeding, being first duly sworn deposes and says:

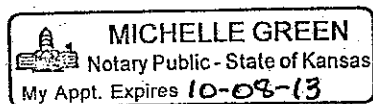
I am the Registrant herein.

I have read the foregoing, and the answers thereto are true to the best of my knowledge, information and belief.

Norm Oeding
Norm Oeding

Subscribed and sworn to before me this 22nd day of November

2010.



Michelle Green
Notary Public

SEAL

My commission expires:

10-08-13

CERTIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF SEDGWICK)

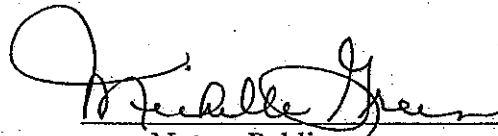
Norm Oeding, being first duly sworn deposes and says:

I am the Registrant herein.

I have read the foregoing, and the answers thereto are true to the best of my knowledge, information and belief.


Norm Oeding

Subscribed and sworn to before me this 27th day of June, 2011.


Notary Public

SEAL

My commission expires:

Oct 8, 2013

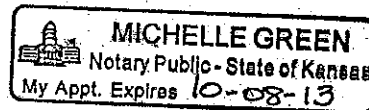


EXHIBIT B

To: Red Hen Bread LLC (Vgrzelak@crmlaw.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77707868 - RED HEN BREAD - Red Hen Brea
Sent: 6/23/2009 4:41:01 PM
Sent As: ECOM109@USPTO.GOV
Attachments: Attachment - 1
Attachment - 2

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77707868

MARK: RED HEN BREAD

77707868

CORRESPONDENT ADDRESS:

VICTORIA GRZELAK
CONNELLY ROBERTS & MCGIVNEY LLC
55 W MONROE ST STE 1700
CHICAGO, IL 60603-5125

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Red Hen Bread LLC

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

Red Hen Brea

CORRESPONDENT E-MAIL ADDRESS:

Vgrzelak@crmlaw.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 6/23/2009

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a); TMEP §§711, 718.03.

Section 2(d) Refusal – Likelihood of Confusion

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S.

Registration No. 3614763. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.*
See the enclosed registration.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

Comparison of the Marks

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b).

The applicant's mark is RED HEN BREAD. The registered mark is LITTLE RED HEN BAKERY. The marks are likely to create the same commercial impression in the minds of consumers, as they share the common wording RED HEN.

Comparison of the Goods

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

The applicant is providing "Bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, danish, tarts and assorted pastries." The registrant is providing "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes" The goods of both parties are closely related in that the applicant and the registrant are both providing bakery goods including bread, buns, bagels, bread rolls and baguettes.

In light of the above, because the marks are similar and the goods of both parties are closely related, registration must be refused under Section 2(d) of the Trademark Act.

Although applicant's mark has been refused registration, applicant may respond to the refusal(s) by submitting evidence and arguments in support of registration.

The applicant must respond to the following informality.

Disclaimer Required

The applicant must insert a disclaimer of BREAD in the application because it is descriptive of the type of goods that are being provided, as evidenced by the identification of goods in the application. See 15 U.S.C. §1056(a); TMEP §§1213, 1213.03(a).

The computerized printing format for the Office's *Trademark Official Gazette* requires a standardized format for a disclaimer. TMEP §1213.08(a)(i). The following is the standard format used by the Office:

No claim is made to the exclusive right to use "BREAD" apart from the mark as shown.

TMEP §1213.08(a)(i); see *In re Owatonna Tool Co.*, 231 USPQ 493 (Comm'r Pats. 1983).

A disclaimer does not physically remove the disclaimed matter from the mark, but rather is a written statement that applicant does not claim exclusive rights to the disclaimed wording and/or design separate and apart from the mark as shown in the drawing. TMEP §§1213, 1213.10.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Amy Alfieri/
Trademark Attorney, USPTO
Law Office 109
phone: 571.272.9422
fax: 571.273.9109

RESPOND TO THIS ACTION: Applicant should file a response to this Office action online using the form at <http://www.uspto.gov/teas/eTEASpageD.htm>, waiting 48-72 hours if applicant received notification of the Office action via e-mail. For *technical* assistance with the form, please e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned examining attorney. **Do not respond to this Office action by e-mail; the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial

filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

Print: Jun 23, 2009

77423259

DESIGN MARK

Serial Number
77423259

Status
REGISTERED

Word Mark
LITTLE RED HEN BAKERY

Standard Character Mark
Yes

Registration Number
3614763

Date Registered
2009/05/05

Type of Mark
TRADEMARK

Register
PRINCIPAL

Mark Drawing Code
(4) STANDARD CHARACTER MARK

Owner
Oeding, Norm INDIVIDUAL UNITED STATES 15076 NW 180th St Newton KANSAS
67114

Goods/Services
Class Status -- ACTIVE. IC 030. US 046. G & S: fresh, baked bread
products, namely, bread, buns, bagels, bread rolls and baguettes.
First Use: 2005/08/29. First Use In Commerce: 2005/08/29.

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BAKERY" APART FROM THE
MARK AS SHOWN.

Filing Date
2008/03/16

Examining Attorney
MAYES, LAURIE

Little Red Hen Bakery